United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7354

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UNITED STATES COURT OF APPEALS

For the Second Circuit.

69 Civ. 442.

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IMBRAHIM, Individually and on behalf of the members of the NATIONAL MARITIME UNION OF AMERICA,

Plaintiffs-Appellees,

against

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN SEGAL, ABRAHAM E. FREEDMAN and LEON KARCHMER,

Defendants,

JOSEPH CURRAN, SHANNON WALL,

Defendants-Appellants.

On Appeal from the United States District Court
For the Southern District of New York.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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REPLY BRIEF OF DEFENDANTS-APPELLANTS

Regretably, the brief filed by appellees so distorts the facts and obfuscates the issues as to require a reply simply to set the record straight. This is particularly unfortunate because the legal issue involved in this appeal -- the right of union officials to be reimbursed for legal fees incurred in the successful defense of suits against them arising out of their actions in office -- is an important one as union counsel are frequently disqualified from representing union officials in Section 501 suits and the cost in legal fees to an individual union official can be financially devasting.

To set the record straight, the reference at page 2 of appellees' brief to an alleged "free ride" with respect to the Bloom and Epstein fees is a totally gratuitous comment which is irrelvant to this proceeding and which has been previously rejected by both Judge Bonsal and by this Court in the last appeal, Morrissey et al v. Curran et al, 526 F. 2d 121 (2nd Cir. 1975). The Bloom and Epstein fees simply have nothing to do with this proceeding, as the services of Messrs. Bromsen, Gammerman, Altier and Wayne were rendered after Messrs. Bloom and Epstein no longer were in the case.

At pages 2 and 3 of appellees' brief, counsel erroneously states that Judge Bonsal found that Curran and Wall had not even followed the NMU constitution. Judge Bonsal did not so state. The statement, which occurred in a colloquy with counsel, was that "the union wasn't living up to its own Constitution" (72a). This is not just a mere difference in phraseology. What was at issue was the interpretation of a provision in the union's constitution which stated that "All officers shall be eligible for benefits under the NMU officers' Pension Plan." Judge Bonsal construed this as meaning that "only" officers were so eligible. This interpretation subsequently was affirmed on appeal in a 2 to 1 decision with what may be fairly characterized as a "vigorous" dissent by Judge Danaher. The issues on the first appeal were sufficiently close and controversial that, on the

subsequent Petition for Certiorari, Justice Byron White felt it appropriate to record his dissent from the denial of the Petition, 399 U.S. 928. Added to this is the fact that, at the subsequent trial in which appellees sought to surcharge Curran and Wall, the evidence was such that their counsel ultimately recognized, and at trial stipulated, that the payments of the monies from the union to the Officers' Pension Plan had been properly authorized by the union's membership. Under these circumstances, even if the money had not been recovered by the union, there probably would not have been a basis for surcharging Curran and Wall. Lastly, the fact remains that the instant application for reimbursement of counsel fees does not involve the defense of the initial stages of this proceeding, but rather the defense of subsequent claims which not only were unmeritorious, but which, we submit, responsible counsel would not have brought.

At page 3 of appellees' brief, counsel refers to "the plan to retire Perry". There was no such plan. This is but another of the unsubstantiated charges that counsel for appellees continually makes apparently in the belief that he can get some mileage out of them even though he knows there

is no basis in fact for them.*

At page 4 of appellees' brief, counsel attempts to justify his appeal from the dismissal of his claim that Curran and Wall should be surcharged on the grounds that, had he not appealed, and had the judgment against Freedman been reversed, Curran and Wall "would not have been present to 'catch the ball.'" Similiarly at page 8, counsel states that if Freedman had been successful, Curran and Wall would have been "off the hook" and that they were successful only because Freedman was not. This type of reasoning is the non-sequitur to end all non-sequiturs. Does it follow that, if the judgment against Freedman had been reversed, Curran and Wall necessarily would have been surcharged? Allegations of misconduct which would lead to a surcharge must stand independently as to each defendant. We do not have a see-saw system of justice which dictates that if one defendant goes up, another must go down, and vice-versa. The appeal against Curran and Wall necessarily rested on its own merit, or more accurately, its lack of merit, and not on any result which

* Counsel for appellees' charges are but a new twist to the "guilt by association" technique. Particularly as to appellant Wall are such charges ludicrous, as Wall and Perry were barely on speaking terms, let alone being co-conspirators in a plot to benefit Perry. As we pointed out in our original brief, Wall appears to have been made a party to this action because he happened to be the union's Secretary-Treasurer and Morrissey's political opponent, and not because he was an active force in anything that occurred.

might be reached on Freedman's appeal. Curran and Wall did not have to be available to "catch the ball", and any such alleged but unjustifiable need for their availability should not be translated into imposing upon them the burden of substantial legal fees for defending an unwarranted appeal simply because counsel for appellees has a see-saw concept of justice.

Finally, in footnotes at pages 6 and 12, counsel for appellees argues that Curran and Wall are seeking to impose their legal expenses on "three ordinary seamen." Nothing of the sort is true. Curran and Wall never made any such claim against the plaintiffs. The union, as an offset to the last fee claim made by counsel for appellees, sought to deduct the fees which Curran and Wall were claiming from any fees that might be awarded to counsel for appellees. This claim was made pursuant to a provision in the union's constitution (Article 21, Section 4) (24a). This application was denied and is not the subject of any appeal, so there is no such claim being made and appellees' brief is misleading, if not clearly deceptive, on this point.*

* While not involved in this appeal, permitting such an offset to awards of legal fees in proceedings of this nature might have real therapeutic value in encouraging counsel to think and act responsibly in deciding who to sue and what claims to sue on.

Conclusion

The brief filed by appellees fails to meet the real issue on this appeal, namely, whether the appellants are entitled to be reimbursed for the legal fees incurred in the successful defense of those subsequent proceedings which were initiated after the District Court had dismissed the Complaint as to them. Appellees' argument that they appealed the dismissal of the refusal to surcharge Curran and Wall as some sort of protective measure so that Curran and Wall would be available to "catch the ball" if the judgment against Freedman had been reversed makes no sense, and even if this were considered to be a rational basis for an appeal, it is certainly the type of proceeding for which Curran and Wall are entitled to be reimbursed their counsel fees.

The subsequent motion to hold Curran and Wall in contempt was so clearly without foundation that counsel for appellees makes no attempt to justify it now, and studiously avoids mentioning it in his brief.

Just as "a rose is a rose is a rose", so too, the abuse of legal proceedings remains an abuse, even when the party guilty of that abuse seeks to cloak himself with the benign mantle of "three ordinary seamen" or "three rank and file union members" battling the establishment. Neither the plaintiffs in this action, nor their counsel, are naive.

They received substantial financial rewards for bringing the litigation. Curran and Wall were continued as parties in the post-judgment proceedings not because there was valid legal claim against them but for political reasons. As a result they were forced to incur legal expenses which should not have been necessary. To now deny them reimbursement of these legal expenses would be unfair to them personally, and would be a breach of the promise of Holdeman v. Sheldon, 311 F. 2d 2 (2nc Cir. 1962), that such reimbursement would be permitted where the union official was successful in his defense.

Respectfully submitted,

Charles Sovel
Attorney for Defendants-Appellants

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AFFIRMATION

Charles Sovel, an attorney-at-law of the State of New York, upon solemn affirmation and subject to the penalties for perjury, certifies as follows: He is not a party to the action and is over 18 years of age; that on December 10, 1976, the undersigned served the within Reply Brief for Defendants-Appellants upon Duer & Taylor, attorneys for Appellees in this acti at 74 Trinity Place, New York, New York, be depositing two copies of same in an enclosed post-paid properly addressed wrapper in an official mail box under the exclusive care and

and custody of the United States Postal Service.

Charles Sovel

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